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not entitled to the office. Therefore, the fact that the candidate who received a majority of the votes cast at an election died before the polls closed does not give the only surviving candidate the right to the office as he did not receive a majority. And the votes for the deceased candidate, having been cast for him in good faith, it is immaterial whether they were cast before or after his death. *Howes v. Perry, Supra.*

Where for any reason not attributable to the electors, the popular will is not expressed, the election is void and a new one must be held. *Cooley's Const. Lim.*, p. 616.

In the case at hand, however, in accordance with the overwhelming weight of authority, both English and American, all the voters at the primary had such knowledge of the death of the nominee who received the highest number of votes, as made it reasonable for the court to assume that they intended to throw their votes away and give the election to that person receiving the highest number of votes.

THE LIMITATION OF THE RIGHT TO RECOVER FOR LOSS OF CONSORTIUM IN NEGLIGENCE CASES.

Consortium is essentially an interest that grows out of the marital relation. By the old common law acception of the term consortium was the exclusive right which the husband and wife had, respectively, to the society, co-operation and aid of each other in every conjugal relation. Any act which was in its nature destructive of the marriage status resulted in a loss of consortium and gave rise to a right of action. Though it has never been denied that this right to recover for the loss of consortium existed in the wife as well as in the husband, in the early actions only the husband was found seeking a recovery. The reason for the failure of the wife to avail herself of her right was the technicality which forbade a wife to sue in her own name. With the enactment of modern statutes, came a time when the wife sought the recovery as often as the husband. During this period the courts were very lax in their examination into the character of the wrongful acts and their effect upon the marital relation. No attempt was made to discover whether the act destroyed the rela-

tion or merely disturbed it. The third period in the development of this right began a few years ago when this distinction was first drawn. As a result, it is now held that in those cases where the wrongful act merely disturbs the conjugal relation neither the husband nor the wife can recover for the loss of the consortium of the other. A number of cases have so held, one of the most recent being *Marri vs. Stamford Ry. Co.*, 78 Atlantic, 582 (Conn.).

In this case, the plaintiff and his wife, while driving, were run into and injured by a car, which was negligently operated by a servant of the defendant. The wife sued in her name and recovered full compensation for her injuries, including pain and suffering. The husband also sued and was awarded damages for his injuries, and the sum of three hundred dollars was allowed him for the loss of the consortium of his wife. The allowance of this sum was assigned as error. The court upheld the contention that such allowance was error, stating that in view of the married women's statutes, a husband in an action for personal injuries to his wife, may not recover for the loss of consortium, whether for loss of what is termed service, or society, or both.

The common law theory that husband and wife were one necessitated the joining of the husband whenever the wife wished to sue for a personal injury. That one was the husband and in him were merged the wife's rights. 1 *Chitty on Pleading*, 84. Technically it was often impossible to join the husband in a common law action, as in a case of criminal conversation, where the husband was really a party to the wrong. Furthermore, whatever damages were recovered became his property and not the wife's. *Cooley on Torts*, p. 227. These conditions have been modified by modern statutes as is shown in *Betser v. Betser*, 186 Ill., 537, decided in 1900. In this case a wife was permitted to sue in her own name and recover for the loss of her husband's affections from one who had alienated them. This recovery rests upon the same grounds and is with the same rights which a husband has under similar circumstances. So, too, in *Seaver v. Adams*, 66 N. H., 142, the wife was permitted to sue in her own name. The tendency of modern legislation is to place the husband and wife on a footing that is more nearly equal in the eyes of the law. This right which the wife now possesses to recover for a personal injury is property and regarded as the separate property of the wife. *Musselman v. Galligher*, 32 Iowa, 383.

There are three types of cases in which the question of recovery for a lessening or entire deprivation of the enjoyment of consortium may arise, namely, abduction, alienation of affections, and criminal conversation; and maltreatment of such a serious nature as to deprive one spouse of the comfort and society of the other for considerable period. 3 *Blackstone Commentaries*, 139. Such offences pierce the very heart of the marital relation, and in these cases a recovery will always be permitted. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action and it is not necessary for him to prove the alienation of the wife's affections, or actual loss of her society and assistance. *Chambers vs. Caulfield*, 6 East, 244; *Wilton v. Webster*, 7 C. & P., 198; *Yundt v. Hartrunft*, 41 Ill., 9.

That actual service of a household nature is the basis of a recovery for loss of consortium is an erroneous idea. In *Bigouette v. Paulet*, 134 Mass., 123, a husband was permitted to recover for loss of consortium from a person who had criminal conversation with his wife, although the act caused no actual loss of her services to him, for it was held that the husband is not the master of the wife, and cannot maintain an action for the loss of her services as his servant. In *Long v. Bove*, 106 Ala., 570, which was a criminal conversation action, there was a claim for damages for loss of wife's services. The claim was allowed, but the services were not regarded as meaning labor performed, or assistance in any material sense. The court held that the deprivation of services, for which the claim was allowed did not imply a loss measurable by pecuniary standards of value such as obtained when a master is deprived of the labor of his servant.

A wrongdoer is conclusively presumed to intend the direct consequences of his acts. *Hale on Damages*, 36. One who has criminal conversation with another's wife, or who alienates her affections, strikes at the foundation of the marital relation. The destruction of that relation is the direct consequence of his act, and a recovery for the loss of consortium will be allowed. *Noxon v. Remington*, 78 Conn., 296; *Foot v. Card*, 58 Conn., 1.

In negligence cases, however, it cannot properly be said that any effect upon the marital relation as such is the direct result of an injury occasioned by a want of care on the part of a third

person. *Feneff v. R. R.*, 203 Mass., 278. This is the most modern doctrine in regard to consortium. For many years consortium has not been so restricted in negligence cases. In *Baker v. Bolton*, 1 Campbell, 493, decided in 1808, a case not unlike most modern negligence cases, the husband was permitted to recover for the loss of the consortium of his wife. But this error was based on what has recently been shown to be an even more flagrant error, namely, the theory that service in the material sense and consortium were one and the same thing.

There is another reason why a recovery for the loss of consortium should not be permitted in negligence cases. By modern legislation, as has been shown, each spouse may now redress his or her injury in a suit for damages. Suppose a wife were injured through the negligence of a third person, she may recover in her own name for all expense attaching to the injury, and for pain and suffering. Under the old theory, the husband would still have a right of action for the loss of consortium, but this would be the sole basis of such an action. However, this is answered by the language of Lord Wensleydale in *Lynch v. Knight*, 9 House of Lords cases, 577, 598: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." Therefore, consortium cannot be the only basis of a recovery; it must be used as aggravation of damages or not at all.

A husband cannot recover in negligence cases for loss of wife's consortium, *Bolger v. Boston Elevated Ry Co.*, 205 Mass., 420, nor can a wife recover in such cases for the loss of her husband's consortium. *Feneff v. R. R.*, 203 Mass., 278.

Therefore it is submitted that the only cases in which compensation should be granted are those in which the wrongful act interferes with the exclusiveness of the marital relation, for this is the essence of the right of consortium, or where the act is wanton, malicious or intentional. In such cases, the loss of consortium is the direct result of the act and necessarily foreseen. But in the case of an injury arising from ordinary negligence the interference with the relation is indirect, remote, consequential and contingent.